

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1997

FILED
January 13, 1998
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

ROBERT CHADWELL BROTHERS,

Appellant.

) C.C.A. NO. 01C01-9611-CC-00473
)
)
) RUTHERFORD COUNTY
)
)
) HON. J. S. DANIEL, JUDGE
)
)
) (ASSAULT)

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Robert Chadwell Brothers, was convicted of an assault following a jury trial in the Rutherford County Circuit Court. He was sentenced to serve eleven (11) months and twenty-nine (29) days, suspended after service of ninety (90) days in the workhouse. The court also ordered Defendant to pay restitution to the victim in the amount of \$2,124.10. In his appeal as of right, Defendant argues two issues: (1) the trial court erred by failing to grant Defendant a new trial based upon the State's failure to comply with Defendant's discovery request and (2) the trial court erred by not reducing the amount of restitution ordered at the sentencing hearing. We affirm the judgment of the trial court.

Only a brief recitation of the facts is necessary to address the issues presented by Defendant in this appeal. On May 28, 1995, Defendant was living at the home of Rhonda Harris in Rutherford County, Tennessee. At about 3:00 a.m., the Defendant, Rhonda Harris, her daughter Stephanie, the victim Timmy Reynolds, and his wife Sharon, were all in the kitchen of Rhonda Harris's home. A heated discussion ensued between Timmy Reynolds and the Defendant. The Defendant was sitting on the counter top and the victim was sitting at the kitchen table. According to testimony at trial, during the argument the victim walked over to Defendant and said, "That's my mother, you don't talk about her like that." The Defendant then left the room but quickly returned carrying a baseball bat. The Defendant hit Timmy Reynolds in the head with the bat and a brawl broke out on the kitchen floor. Stephanie Harris drove the victim to the hospital. He received

twelve (12) stitches for the laceration to his scalp caused by the Defendant striking him with the bat. The victim also complained at the hospital that his knee was injured during the fight.

The Defendant was represented pre-trial, during the trial, and through the sentencing hearing by a court-appointed attorney. The trial counsel filed a motion for new trial and amended motions for new trial on behalf of Defendant. The record reflects that a conflict developed between Defendant and his court-appointed counsel. The trial court entered an order prior to the hearing on the motion for new trial allowing the appointed counsel to withdraw, and ordered Defendant, who no longer qualified as indigent, to retain counsel for the hearing on the motion for new trial. This new counsel also represents Defendant on appeal.

I. ALLEGED FAILURE TO PROVIDE DISCOVERY INFORMATION

The proof at the motion for new trial hearing reflects that Defendant's trial counsel filed a motion for discovery pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure. Trial counsel also testified that she subsequently made a specific request for the medical records of the victim, Timmy Reynolds. She was informed by the State on the day before trial that the State did not yet have the medical records of the victim. The trial was held January 9, 1996.

On approximately January 3, 1996, trial counsel for the Defendant delivered a subpoena to Ruth Green, custodian of the medical records of Middle Tennessee Medical Center in Murfreesboro, for her to bring all of the medical

records of the victim to the Circuit Court of Rutherford County on January 8, 1996 for pre-trial motion hearings. The records and affidavit of Ruth Green, which were brought by her to court pursuant to this subpoena on January 8, 1996, were made an exhibit at the hearing on the motion for new trial. Trial counsel also had access to review at least some of the medical records on or about January 3, 1996. The proof strongly implies that trial counsel only had questions about a portion of the medical proof, and as a result, only requested to see some of the medical records on January 3. In any event, the record clearly reflects that trial counsel had all of the records under subpoena and at her disposal for review the day before trial. The entire medical record consists of six (6) pages.

Trial counsel testified at the hearing on the motion for new trial that she observed the Assistant District Attorney during the trial with copies of medical documents which apparently were from the victim's medical records. At trial counsel's request, and without the necessity of issuance of a subpoena, Ruth Green came to the trial with all of the medical records and testified during the Defendant's presentation of evidence. Again, trial counsel did not request that a copy of the medical records be made an exhibit, or otherwise take steps to request a recess to review the medical records during the trial. No satisfactory explanation was given in the proof at the motion for new trial hearing as to why defense counsel chose not to review all of the records the day before trial when they were in court under subpoena, or during the trial when the records were again brought to court.

Trial counsel testified at the motion for new trial hearing that the medical records contained the following information which could have been used

to impeach the victim. First, trial counsel stated that the victim testified that thirty (30) stitches were required for the laceration to his head, but the medical records reflected only twelve (12) stitches were necessary. However, this fact was brought out at trial during the testimony of Ruth Green as a direct result of trial counsel's review of a portion of the medical records the week prior to trial.

Next, trial counsel testified that the medical records reflect Defendant made the statement that he was involved in an "altercation," but his testimony at trial was that he was struck from behind by Defendant wielding a baseball bat. However, trial counsel admitted during her testimony that she saw the two handwritten pages of the medical records prior to trial. On one of these handwritten pages, there is typed at the top of the page where intake information is noted, "altercation/hit in head w/ bat." On that same page, under the section marked "chief complaint" there is written "see triage." The triage assessment is the other handwritten page apparently observed by trial counsel prior to Defendant's trial. There is nothing on this page to indicate that the victim referred to the incident as an "altercation." The medical personnel's description of the history on the radiology diagnostic reports is as an "altercation," but there is nothing to indicate that this is anything more than a summary by medical personnel rather than a statement by the victim.

Trial counsel next testified that the medical records that were not provided by the State showed that the victim had no injury to his knee. Trial counsel asserted that this would contradict the victim's testimony at trial that he had fallen to his knee after being struck on the head and had lost work for a period of time due to his knee injury. However, on the handwritten portion of the

medical records which were available to trial counsel prior to trial, it plainly states that part of the victim's diagnosis was a contusion to the left knee. Further, the written instructions to the victim following his release from the hospital included instructions to use ice packs and to elevate his knee to lessen swelling.

Finally, trial counsel stated that the medical records withheld from her contained information that the victim had an obvious odor of alcohol on his breath, which would have contradicted his testimony at trial that he had not been drinking on the night of the assault. However, the indication of "obvious" odor of alcohol on the victim's breath was contained on one of the two handwritten pages of the medical records. As noted above, trial counsel admitted during her testimony to having seen the handwritten pages prior to the trial when she first met with Ruth Green.

In his brief, Defendant concedes that the State was not supplied with the medical records of the victim until January 8, 1996, the day before trial. As noted above, Defendant's trial counsel had access to the records the week prior to trial, as well as access to the records on the day before trial pursuant to a subpoena issued by Defendant's trial counsel, and also had the opportunity to at least request review of the records further on the trial date of January 9, 1996. There is no satisfactory explanation in this record why trial counsel did not take advantage of the three opportunities to thoroughly review all six (6) pages of the medical records.

Normally upon request of a defendant and upon proper showing that the documents defendant seeks are discoverable under Rule 16(a)(1)(c), the

State must give defendant these documents “which are within the possession, custody or control of the State.” However, from this record, it is clear that not only did Defendant have access to the medical records of the victim prior to trial, but that Defendant had access to the records prior to the State even receiving the records. In State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993), our Court held that “[t]he [S]tate is not obliged to furnish the appellant with information, evidence, or material which is available or accessible to him or which he could obtain by exercising reasonable diligence.”

Under the circumstances of this particular case, we find no error by the trial court in denying Defendant’s motion for new trial on the basis that the State allegedly failed to provide information requested pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure.

II. ALLEGED FAILURE OF TRIAL COURT TO REDUCE RESTITUTION

In this issue, Defendant argues that the medical records which were made an exhibit at the hearing for the motion for new trial contradicted testimony of the victim that he had injured his knee during the assault. Consequently, Defendant states that the trial court erred by not reducing the amount of restitution ordered, as some medical expenses included in the pre-sentence report were for treatment to a knee injury.

Defendant did not offer the testimony of any person that would support his argument that the medical records show that the treatment of the victim’s knee was not related to the assault, other than the speculative testimony

of his trial counsel. Defendant did not set forth in the trial court or in this court the amount that he claims the restitution should be reduced. The medical bills were included in the pre-sentence report. As Defendant did not offer proof that these expenses were not medically reasonable and necessary, there is nothing in the record to support his contention that the restitution should have been reduced. With no proof in the record to support his assertions, the issue is without merit.

Finding no error, we affirm the judgment of the trial court.

THOMAS T. WOODALL, Judge

CONCUR:

GARY R. WADE, Judge

J. CURWOOD WITT, JR., Judge